SUPREME COURT, U.S.

73-1747

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In the Supreme Court of the United States

_____ TERM, 1974

NO. A-960

COORS PORCELAIN COMPANY, *Petitioner,*

v.

STATE OF COLORADO and JOHN H. HECKERS,
Director of Revenue, *Defendants*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

Petitioner, Coors Porcelain Company, a Colorado corporation, (hereinafter sometimes referred to as "Coors") petitions this Honorable Court that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Colorado.

OPINIONS BELOW

The opinion of the Supreme Court of Colorado is reported at _____ Colo. _____; _____ P2d _____ (1973). The case was appealed from the trial Court to the

Colorado Court of Appeals. The Colorado Court of Appeals on its own motion requested the Colorado Supreme Court to accept jurisdiction because constitutional issues were involved. The Colorado Supreme Court accepted jurisdiction therefor no opinion was rendered by the Colorado Court of Appeals. The opinion of the Colorado District Court for the County of Jefferson is unreported.

JURISDICTION

This Court's jurisdiction is invoked on the grounds that federal law is invalid as applied to the taxation of a domestic corporation, that the Colorado corporate income taxing statute is invalid as being repugnant to the Constitution and laws of the United States and on the grounds that petitioner's rights and privileges under the Constitution and laws of the United States have been violated and denied by the State of Colorado.

i. *Date of Judgment.* December 10, 1973.

ii. *Date Petition for Rehearing Denied.* January 28, 1974.

Date Order Extending Time to File Petition for Writ of Certiorari. Order dated April 10, 1974 granting extension to May 28, 1974.

iii. *Jurisdiction to Review Judgment of Supreme Court of Colorado.* 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether Federal Public Law 86-272, 15 U.S.C. 381 can be applied as a standard by the State of Colorado to determine if a domestic Colorado corporation (Coors) which is engaged in interstate commerce is doing business outside the State of Colorado for purposes of imposing a Colorado corporate income tax on Coors' out-of-state sales.

A. Does Federal Public Law 86-272, 15 U.S.C. 381, apply to domestic corporations?

B. Did Federal Public Law 86-272, 15 U.S.C. 381, render the standards for "doing business" as set forth by the United States Supreme Court in the *Northwest States Portland Cement Co.* case as no longer being the law?

C. If Federal Public Law 86-272, 15 U.S.C. 381, does establish a standard for the taxation of domestic and foreign corporations engaged in interstate commerce, must such law be applied uniformly by all the states?

2. Can a state tax that part of the income of a domestic corporation engaged in interstate commerce which is derived from sales and activities occurring outside such domestic state?

A. Does a state corporation income taxing statute which is applied against a corporation engaged in interstate commerce in an unapportioned manner violate the interstate commerce and due process clauses of the United States Constitution?

B. Does the burden or threat of multiple state taxation of interstate sales render the imposition of such tax violative of the interstate commerce and due process clauses of the United States Constitution?

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

United States Constitution

Article I, Section 8, Clause 3 – Interstate Commerce Amendment, Article XIV, Section 1 – Due Process, Equal Protection of the Laws.

Statutes

Federal

15 U.S.C. 381, Federal Public Law 86-272

Colorado

C.R.S. 1953, 138-1-3
C.R.S. 1963, 138-1-35
C.R.S. 1963, 138-1-37

Regulations

Colorado

Reg. 35 under C.R.S. 138-1-35
Reg. 37 under C.R.S. 138-1-37

STATEMENT OF THE CASE

This case involves the state income taxation under the Colorado taxing statutes of a Colorado Corporation which conducts and operates its business in interstate commerce. The taxable years 1963, 1964, 1965 and 1966 are involved. The State of Colorado determined that Coors carried on no business outside the State of Colorado and, therefore, was not entitled to apply the Colorado allocation and apportionment formula in computing its Colorado corporate income taxes. The Colorado Supreme Court decision requires Coors to pay a Colorado corporation income tax on its entire income, including its income derived from sources and sales outside the State of Colorado.

The facts of this case are not in dispute. The case was submitted to the trial Court upon an agreed Stipulation of Facts. The Stipulation of Facts is part of the previously certified record. The trial court determined that a portion of these facts contained in paragraph 18 of the Stipulation of Facts relating to whether Coors paid corporate income taxes in States other than Colorado were immaterial and irrelevant.

Coors is a corporation incorporated on January 4, 1911 under the laws of the State of Colorado. It has continuously operated its business since that date. Coors manufactures porcelain and ceramic products at its manufacturing plant located at Golden, Colorado. It sells its products within and without the State of Colorado.

Coors employs sales employees or sales agents for all of the states and foreign countries where their products are sold.

During the years involved Coors employed approximately ten salaried field sales employees, all of whom held the title

of Regional Sales Manager. During this period it also employed approximately ten commissioned sales agents. All of these employees reside in and maintain their business offices outside the State of Colorado and in states where Coors' products are sold.

Throughout the years of its existence, Coors has consistently allocated its gross receipts from sales between those within and outside of Colorado. Accordingly on its Colorado corporate income tax returns herein involved it applied the Colorado statutory apportionment formula in determining its taxable Colorado corporate income.

Coors is engaged in a highly competitive business. A large number of other competitive companies sell similar or related products, Coors has approximately 1,500 customers throughout the United States and foreign countries. It primarily operates a job shop manufacturing custom items. About 10% of its manufactured products are standard cataloged items. The volume of its business and resulting profits have consistently increased from 1963 to present. Aside from a minor amount of advertisement, Coors relies entirely upon its out-of-state field personnel to promote and sell its products, to assist in the design of its various products and to develop new customer business in the various states. As a result of the efforts of its out-of-state representatives throughout the United States and foreign countries, each year Coors has increased and expanded its gross sales, its out-of-state sales force and its out-of-state areas of sale.

Coors requires that their field representatives be technically qualified in the ceramics and porcelain business. Prior to employment they must possess educational background and practical experience in this specialized field. These field representatives are further trained by Coors. The field representatives' duties and responsibilities are as follows: To solicit sales from present customers and to develop and acquire new customers; To be fully knowledgeable with respect to all the facets of Coors products in order to be able to demonstrate to present and potential customers the advantages of Coors product over other available products; To

design parts for manufacture by Coors which will fit the needs of a particular customer or potential customer; To be able to intelligently discuss with customer engineers the problems they are encountering and to recommend design of Coors products to solve the particular problem involved; To be able to present price quotations to the customer and negotiate such prices; To follow up after such price quotation for the purpose of insuring that the potential customers will place their order with Coors; To develop new application for Coors products with present or new customers; To generally develop and maintain a good public relationship with the technical employees and purchasing agents of Coors customers; To maintain all essential records required for field operations including delivery and order records; To discuss with customers any complaints or problems involving the purchased Coors product; To demonstrate to customers how each Coors product operates and explain to them why they should use and purchase the Coors product.

Orders are mailed either from the field agent or from a customer out-of-state to Golden, Colorado, from which point the orders are approved and shipped. Some out-of-state agents buy directly from the Golden, Colorado, plant and resell to their customers outside of Colorado; some of the field agents merely solicit the orders from customers and Coors ships directly to the out-of-state customer and pays a commission to the field agent. Prices are established based on production standards determined in its Estimating Department, or by negotiation between the engineering field salesman and the customer and approved by the office in Golden, Colorado. All sales are completed upon delivery to and acceptance by the out-of-state customer. Most of its manufactured products are custom made at Golden, Colorado, as the result of designs submitted by its out-of-state field representatives.

Each field representative maintains his own business office in the locality wherein he resides. Coors supplies each field representative with a business automobile and also places advertisements in the local telephone directory listing the local representative's business telephone. Coors does not consistently maintain warehouses or stocks of products, parts or

supplies outside of Colorado, but its out-of-state representatives do consistently maintain sample materials owned by Coors and on occasion they possess Coors' products for shipment to the customer and also retain Coors' products which have been rejected by the customer upon delivery.

The State of California has recently determined that Coors is subject to payment of California income tax on sales made in California. This matter is presently pending on an administrative level. Coors pays unemployment taxes in other states.

FEDERAL QUESTION RAISED

(a) *Colorado Department of Revenue.* Coors originally raised the federal question in its Protest in response to the Notice of Deficiency issued by the Colorado Department of Revenue. The Protest was denied because Coors therein raised a constitutional issue. (The determination letter from the Colorado Department of Revenue is attached as part of Appendix A).

(b) *Trial Court.* The federal question was raised in the complaint filed with the Colorado District Court for the County of Jefferson. Paragraphs 8F and 8G of the complaint read as follows:

> "F. The above referred to Colorado laws upon which Defendant seeks to impose a Colorado income tax upon business income derived by Plaintiff from sales transacted, negotiated and consummated without the State of Colorado, is violative of Plaintiff's constitutional rights and therefore these aforesaid Colorado laws are not enforceable for this purpose against Plaintiff.
>
> G. The aforesaid Colorado laws upon which Defendant seeks to impose an income tax upon the business income of Plaintiff corporation which it realized from without the State of Colorado, violates the Constitution of the State of Colorado and the Constitution of the United States. Such aforesaid Colorado laws are in direct

conflict with the existing federal laws and Constitution and such Colorado laws seek to impose a tax upon interstate commerce and to deny the Plaintiff its rights to due process of law, equal protection of the laws, and to operate freely in interstate commerce."

These questions were also presented to the Trial Court in briefs filed with that Court and upon oral argument.

The federal issues were further raised in the Trial Court by plaintiff's Motion to Amend the Judgment or in the Alternative for a New Trial and Brief in Support thereof.

The Trial Court did not specifically rule on the constitutional issues raised in the complaint. (The Trial Court's judgment and Order of District Court denying Plaintiff's Motion to Amend Judgment or in the Alternative, for a New Trial are attached as part of Appendix A).

(c) *Colorado Court of Appeals.* The Appellant, Coors Porcelain Company, refers to the constitutional issues throughout its Original Brief and Reply Brief filed with the Colorado Court of Appeals. The constitutional issues are specifically referred to at pages 28 through 32 of the Original Brief and page 9 of the Reply Brief.

The Colorado Court of Appeals referred this case directly to the Colorado Supreme Court because constitutional issues were involved, therefore no opinion was rendered by the Colorado Court of Appeals. (The Colorado Court of Appeals Request for Determination of Jurisdiction and Supreme Court of Colorado's acceptance of jurisdiction are attached as part of Appendix A).

(d) *Colorado Supreme Court.* The only pleading filed directly with the Colorado Supreme Court was petitioner's Petition for Rehearing. The constitutional issues were therein discussed at pages 4 and 5 of the Petition. The Colorado Supreme Court in its Opinion which is attached as part of Appendix A refers to the constitutional issues at pages 4 through 10 inclusive.

All of the pleadings and briefs herein referred to are part of the record previously certified and transmitted to the Court or are attached to Petitioner's Motion for Extension of Time in which to File Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

A. *Effect of Federal Public Law 86-272.* The Colorado Supreme Court in its Opinion determined that Federal Public Law 86-272 established a standard for determining whether Colorado domestic corporations were doing business outside the State of Colorado and that the Supreme Court decision in *Northwestern States Portland Cement Company v. State of Minnesota and T. V. Williams, Commissioner of Georgia v. Stockham Valves and Fittings Inc.* (U.S. Sup. Ct. 1959) 358 U.S. 450; 79 S. Ct. 357, was no longer applicable law. This case is hereinafter referred to as *Northwestern*. In its opinion at page 9 the Colorado Supreme Court said:

> "Coors contends that the federal statute relates only to standards applicable to a foreign corporation, and that the corollary cannot be used as standards for taxable income by the state in which the corporation is domestic. Therefore, says Coors, *Northwestern States Portland Cement Co. v. Minnesota, supra,* is applicable and, under the stipulated facts, Colorado cannot tax income attributable to other states. We disagree and hold that the statute may be used in a correlative manner . . ."

It is apparently conceded by the State of Colorado, per its briefs, and by the Colorado Supreme Court according to its opinion, that if the United States Supreme Court decision in *Northwestern* was still the law, then Coors would be "doing business" outside the State of Colorado.

Both the State of Colorado and the Colorado Supreme Court interpret Public Law 86-272 as superseding and altering the "doing business" test definition set forth in the *Northwestern* case. This new "doing business" standard was then applied by the Colorado Supreme Court to Coors to prohibit it from allocating and apportioning its income between its

income derived from sales and sources within and without the State of Colorado. The result is that Coors is required to pay a corporate income tax upon 100% of its income to the State of Colorado.

Public Law 86-272 was passed by the United States Congress shortly after the rendition of the *Northwestern* decision. It was designed to afford limited and minimal tax relief with respect to the taxation by foreign states of corporations engaged in interstate commerce. Public Law 86-272 was never intended to establish a shelter for domestic corporations nor to impose a standard for taxing domestic corporations. This federal law has only limited application to taxation by foreign states of foreign corporations operating in interstate commerce.

Paragraph (b)(1) of Public Law 86-272 provides as follows:

> "(b) The provisions of subsection (a)[1] of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to –
>
> (1) any corporation which is incorporated under the laws of such State; or"
>
> * * *

In the Senate Committee report at page 659 it is stated:

> "The bill does not give to the state any power to tax income derived from interstate commerce. The power of the state in this respect will be determined with no reference to the bill."

It seems clear that the United States Senate did not intend that this federal legislation would negate the effect of the United States Supreme Court decision in *Northwestern.*

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[1]subsection (a) imposes limitations on the power of states to tax foreign corporations.

Further, if Public Law 86-272 had been intended to establish an absolute standard for the taxation of both foreign and domestic corporations engaged in interstate commerce, there would have been no need for Title II of the act – Study and Report by Congressional Committees. Since the passage of the act these studies have been exhaustive and comprehensive.

The various individual state corporate taxing statutes vary. None were drafted or designed in a manner in which this federal law could control their operation in a constitutional and fair manner.

It is noteworthy that in 1963 the Colorado legislature amended its Colorado corporate income taxing statute. None of the amendments are pertinent to the issues in this case. The fact that none of the provisions of the existing federal law were then incorporated into the new Colorado statute is pertinent.

The Colorado Supreme Court determined without citing any authority, that the Colorado legislature intended to tax all the income it could constitutionally tax. The Court then reasons that by applying Federal Public Law 86-272 as a standard to determine if Coors is "doing business" outside the State of Colorado this intent will then be accomplished.

It is a well accepted principal of law that legislative intent can never be presumed and further that the legislative branch of the government of the State of Colorado has no power to delegate its legislative power to another governmental agency, including the United States. *Wallace v. Commissioner of Taxation* (Sup. Ct. of Minn., 1971) 184 N.W. 2d 588. Therein the Court said:

> "In considering the issue of whether a change in Federal law may alter the force and effect of provisions in a prior state law governing the same subject, it may be said that the principle which controls is that a state legislature may not delegate its legislative powers to any outside agency, including the Congress of the United

> States. The reason for this rule is that changes in the foreign legislation may not fit the policy of the incorporating legislature and the person subjected to the changed law would be denied the benefit of the considered judgment of his legislature on the matter. The basic objection derives from the principle that laws should be made by elected representatives of the people responsible to the electorate for their acts."

* * *

In response to the State of Minnesota's argument that legislative intent must be presumed the Minnesota Supreme Court said:

> "We must reject this argument on the well-established ground that courts cannot supply that which the legislature purposely omits or inadvertently overlooks. Cf. *Martinco v. Hastings,* 265 Minn. 490, 122 N.W. 2d 631; *State v. Moseng,* 254 Minn. 263, 95 N.W. 2d 6."

It is noteworthy that in decisions rendered after the *Northwestern* and *Stockham* companion cases the Courts of Minnesota and Georgia (the two States therein involved) both determined that domestic corporations with out-of-state activities similar to those of Coors were entitled to allocate and apportion its respective income. *Tonka Corporation v. Comm. of Taxation* (Sup. Ct. of Minn., 1969) 169 N.W. 2d 589, and *Hawes, Commissioner v. William L. Bonnell Company, Inc.* (Ct. of App., Georgia 1967, cert. denied) 156 S.E. 2d 536. See also *Commonwealth of Pennsylvania v. Hellertown Manufacturing Co.* (Sup. Ct. of Penn., 1970) 264 A.2d 382; *Cal-Roof Wholesale Inc. v. State Tax Comm.* (Sup. Ct. of Oregon, 1965) 410 P2d 233; *Wisconsin Department of Taxation v. Blatz Brewing Co.* (Sup. Ct. of Wisc., 1961) 108 N.W. 2d 319.

None of these above referred to states have interpreted Public Law 86-272 as being applicable to the taxation of domestic corporations.

For example, in the *Hawes*, Georgia decision, the Court stated:

> "The federal Act at best only impliedly modified the 1959 Act[2] insofar as a foreign corporation's activities within the state are concerned. The fact that attempting to tax a foreign corporation under that provision might now run afoul of the federal statute would not effect the provision as to Georgia corporations with described activities in other states. The federal law does not endeavor to pre-empt that area. It did not in any manner relate to the act's provisions insofar as a domestic corporation was concerned."

If federal Public Law 86-272 does, in fact, establish the "doing business" standard for determining the taxation of domestic and foreign corporations engaged in interstate commerce then to avoid constitutional violations such standard must be uniformly applied by all of the states.

Based upon the numerous Court decisions of the various states, it is clearly shown that it is unsettled as to what business activities a corporation may engage in within a state and still receive the protection of the federal law. A single approach to the jurisdictional limitations has not been developed. See *Clairol Inc. v. Kingsley* (Sup. Ct. of N.J., 1970) 270 A 2d 702; 57 N.J. 199; *Smith Kline & French Laboratories v. State Tax Commission*, 241 Ore. 5D 403 F.2d 375 (1965); *Heublein Inc. v. South Carolina Tax Commissioner*, 93 S. Ct. 483 (1972).

The Colorado Supreme Court's interpretation of Public Law 86-272 does not prevent the imposition of an income tax against Coors by foreign states. Under Public Law 86-272 Coors is subject to multiple taxation by being subject to taxation by states other than Colorado.

The activities of Coors out-of-state employees are as follows: Coors' employees are not salesmen who merely solicit

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[2]Reference is here made to the Georgia corporation income taxing statutes.

orders. Coors' employees are all ceramics engineers who are technically qualified and specially trained. These employees not only solicit orders for Coors' products, but actually design parts and machinery for the customer to be manufactured by Coors. Coors' field engineers are constantly developing new uses and application of Coors products. They demonstrate the operation of such products and have many other business contacts with their present and potential customers. Ninety percent of Coors' products are specially manufactured to fit the customers' needs and are produced from the field engineers' design. In addition, the field men also negotiate the price for these custom made items. They always maintain sample materials and hold some Coors' products for resale. Every Coors' field engineer is supplied with an automobile and local advertising.

Surely the normal activities of Coors' field employees extend past mere solicitation of sales and, therefore, remove it from the protection of Public Law 86-272.

Under Section 16 of the Uniform Division of Income for Tax Purposes Act[3] in order to "throw back" a corporation's income for tax purposes to the domestic state or any other state of contact it is first determined whether a corporate income tax is being paid in the foreign state.

The Colorado Supreme Court decision is inconsistent with this Federal Act. The Colorado Courts determined that whether Coors paid corporate taxes in other states was immaterial and irrelevant[4] in determining if a Colorado income tax could be imposed on all of Coors income.

The questions presented by the Colorado Supreme Court's determination that Public Law 86-272 applies to the taxation of domestic corporations are far reaching and substantial, and are in conflict with present United States Supreme Court decisions.

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[3]This Act has been adopted by 23 states.

[4]See Coors Objections to Stipulation of Facts and Colorado District Court Judgment.

1. A federal law, which by its very express provisions, does not apply to domestic corporations, has been used and applied by the Colorado Supreme Court in order for the State to impose and collect all the possible tax that it can.

2. The Colorado Court has ignored a United States Supreme Court decision by applying Public Law 86-272 as the test for "doing business" by a domestic corporation outside its domestic state rather than the standard set forth in the *Northwestern* decision.

3. The Colorado Supreme Court decision is in conflict with other State Court decisions which have determined that Public Law 86-272 does not apply to the taxation of domestic corporations, including decisions by Georgia and Minnesota – the two states which were parties to the *Northwestern* case.

4. The Colorado Supreme Court's determination that Coors' activities come within the protection of Public Law 86-272 is in conflict with other State Court decisions and the decision of this Court in *Heublein.*

5. The Colorado Supreme Court's decision is in conflict with the Uniform Division of Income for Tax Purposes Act.

Coors is being denied its constitutional rights under the instant Colorado Supreme Court decision by reason of the fact that it shall be subjected to multiple taxation among the states and thus placing an unfair burden upon interstate commerce. This situation denies Coors due process of law and equal protection under the laws.

B. *Taxation of Out-of-State Sales.* Coors operates its business in interstate commerce. Coors sells its manufactured goods within and outside the State of Colorado. The sales made outside the State of Colorado are those which are here in question. All products sold by Coors represent tangible personal property.

In a recent United States Supreme Court decision, *Evco v. Jones Commissioner, New Mexico* (1972) 93 S. Ct. 349 the Supreme Court determined that a tax levied on the gross receipts from the sales of tangible personal property in

another state is an impermissible burden on interstate commerce. In this case the State of New Mexico sought to tax the entire gross receipts of Evco, a domestic New Mexico corporation. In explaining its decision, the United States Supreme Court said:

> "But a tax levied on the gross receipts from the sales of tangible personal property in another state is an impermissible burden on commerce. In J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S. Ct. 913, 82 L.Ed. 1365, we rejected as unconstitutional a State's attempt to impose a gross receipts tax on a taxpayer's sales of road machinery to out-of-state customers.
>
> 'The vice of the statute as applied to receipts from interstate sales in that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.' 304 U.S. at 311, 58 S. Ct. at 916. See also *Gwin, White & Prince, Inc. v. Heneford* 305 U.S. 434, 59 S. Ct. 325, 83 L.Ed. 272."

Whether New Mexico's tax was labeled a gross receipts, net income, or sales tax is unimportant. Courts consider the practical operation of a tax and not the name of the tax. *Railway Express Agency v. Comm. of Virginia* (1954) 77 S. Ct. 558, 347 U.S. 359, 98 L.Ed. 757.

Coors, like Evco, is a domestic corporation. In *Evco*, the state of origin (domestic state) was denied the right to levy a tax on Evco's out-state sales.

The Colorado District Court determined at time of trial that whether Coors paid corporate income taxes in other states was immaterial and irrelevant. Such evidence was held to be inadmissible. It would appear that the trial Court was

rejecting the application of Public Law 86-272 because at that time the *Evco* case had not been decided. In *Evco*, the domestic corporation, was not required to prove multiple taxation existed. The mere threat of such a burden rendered the tax unconstitutional.

Coors has clearly demonstrated to the Court that the threat of multiple taxation of its income exists. See also *Freeman v. Hewit* 329 U.S. 249 (1946).

If a state reaches too far in its attempt to impose an income tax on interstate business its taxing statutes become violative of the United States Constitution. The United States Constitution requires that states impose taxing statutes that fairly and reasonably apportion interstate income. The State adherence to the fair and reasonable apportionment rule is essential to the free flow and growth of interstate commerce. *Hans Rees Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931).

This Court said in the *Hans Rees Sons* case:

> "These decisions are not authority for the conclusion that where a corporation manufactures in one state and sells in another, the net profit of the entire enterprise, as a unitary business, may be attributed, regardless of the evidence, to either state. In the Underwood case it was not decided that the entire net profit of the total business was to be allocated to Connecticut because that was the place of manufacture, or in the Bass case, that the entire net profits were to be allocated to New York because that was the place where the sales were made. In both instances, a method of apportionment was involved which, as was stated in the Underwood case, from what appeared in the record, reached, and was meant to reach, only the profits earned within the state."

A statute that does not permit a corporation engaged in interstate commerce to fairly and equitably allocate and apportion its income violates the constitutional guarantees of due process of law, equal protection of the law, places an unfair burden upon interstate commerce and impairs its right to engage freely in interstate commerce.

In the *Northwestern* case this principal of law was clearly stated.

> "This is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share. As was said in Central Greyhound Lines of New York v. Mealey, 1948, 334 U.S. 653, 661, 68 S. Ct. 1260, 1265, 92 L. Ed. 1633, 'it is interstate commerce which the State is seeking to reach and *** the real question [is] whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation.' The apportioned tax is designed to meet this very requirement and 'to prevent the levying of such taxes as will discriminate against or prohibit the interstate activities or will place the interstate commerce at a disadvantage relative to local commerce."

The United States Supreme Court further demonstrated in *General Motors Corp. v. District of Columbia*, 381 U.S. 553 (1965) its authority over the imposition of taxes on corporations engaged in interstate commerce and the Court's directive in *Northwestern* that such taxes must be fairly and reasonably apportioned was reaffirmed.

The Colorado Supreme Court has erroneously determined that the State of Colorado may levy a tax which is unapportioned and unallocated against a domestic Colorado Corporation engaged in interstate commerce. Further the Colorado Supreme Court has determined that the State of Colorado may impose this type of tax without regard to its interference on the free flow of business in interstate commerce.

The issues herein raised are not only important to Petitioner, but also are of substantial interest to other United States corporations engaged in interstate commerce. The Colorado Supreme Court decision in Coors is in direct conflict with principals of law previously established by this Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

State of Colorado
Department of Revenue
State Capitol Annex
Denver, Colorado 80203

May 9, 1968 IN REPLY REFER TO: IT:GDR:mlm

COORS PORCELAIN COMPANY
600 Ninth Street
Golden, Colorado 80401

ATTENTION: Mr. Max W. Goodwin
Assistant Secretary
RE: D-1 #8-0827 of 2/23/68 ($78,993.34)
1963 (03-24-160341)
1964 (03-18-240812)
1965 (03-17-140804)
1966 (04-18-270152)
(11-02609)

Gentlemen:

Your income tax file, including your protest letter of March 11, 1968, has been referred to this office for review and determination.

The matter of the constitutionality of Section 138-1-135, Colorado Revised Statutes, 1963 as amended, is beyond the jurisdiction of the Department of Revenue. Therefore, your protest of the assessments issued February 23, 1968 against income tax for the years indicated is hereby denied.

A Notice of Final Determination of Tax and Demand for Payment will be issued in the regular course of business.

Very truly yours,

DEPARTMENT OF REVENUE

By /s/ G. D. Reid
G. D. Reid – Conferee

CC:
Miss Julie M. Reardon
REARDON, REARDON and REARDON
Attorneys at Law
2150 First National Bank Building
Denver, Colorado 80202

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 30918

COORS PORCELAIN COMPANY	)	
Plaintiff	)	
vs	)	JUDGMENT
STATE OF COLORADO and JOHN H.	)	
HECKERS, Director of Revenue,	)	
Defendants	)	

The Court finds the stipulated facts to be facts in this case and sustains plaintiff's objection to defendant's proposed stipulation of fact that plaintiff pays no income tax outside Colorado.

The Court notes that the plaintiff hires salesmen and maintains offices in many other states to design and promote the business of plaintiff, but no contract for the sale of any product, the income from which defendant taxes herein, is executed by plaintiff outside Colorado. The corporate activity outside Colorado, is not doing business outside Colorado.

The Court finds as the conclusive fact herein that plaintiff does no business outside Colorado and has no established business tie outside Colorado.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's complaint be and hereby is dismissed with prejudice.

DONE THIS 14th day of April, 1972.

BY THE COURT:

/s/ Roscoe Pile
Judge

IN THE DISTRICT COURT IN AND FOR THE

COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 30918

COORS PORCELAIN COMPANY, Plaintiff	)	
vs	)	ORDER OF COURT
STATE OF COLORADO and JOHN H. HECKERS, Director of Revenue, Defendants	)	

The Court having before it Plaintiff's "Motion to Amend Judgment or in the Alternative, for a New Trial" and the Memorandum Brief in support thereof; the Answer Brief of Defendant opposing said Motion; Plaintiff's reply to said answer brief, and the Court having dispensed with oral arguments herein and having considered the three said briefs:

ORDERS that Plaintiff's motion be and is hereby denied.

/s/ Roscoe Pile
District Judge

CC: Eugene Cavaliere, Ass't Atty General
104 State Capitol Bldg., Denver, Colorado 80203
Julie Reardon, 2150 First National Bank Bldg.,
Denver, Colo. 80202

IN THE COURT OF APPEALS

OF THE STATE OF COLORADO

No. 72-340

COORS PORCELAIN COMPANY, Plaintiff-Appellant, v. STATE OF COLORADO and JOHN H. HECKERS, Director of Revenue, Respondent-Appellees.	)))))))))	REQUEST FOR DETERMINATION OF JURISDICTION

It appearing to the Court of Appeals that the within case may not properly be within the jurisdiction of said court on the ground that the constitutionality of a statute is in question, as set forth in the brief of the appellant attached hereto, (page 28).

NOW THEREFORE the within case is hereby referred to the Supreme Court pursuant to 1969 Perm. Supp., 1963 C.R.S., 37-21-10 (1) (a) and the Court of Appeals respectfully requests that the Supreme Court decide the question of jurisdiction pursuant to said statute.

By the Court: Harry S. Silverstein, Jr.
Chief Judge

Dated: August 28, 1973

IN THE SUPREME COURT

OF THE STATE OF COLORADO

COORS PORCELAIN COMPANY,	)	
	)	
Plaintiff-Appellant,	)	
	)	APPEAL FROM THE
26158 vs.	)	DISTRICT COURT OF
	)	JEFFERSON COUNTY
STATE OF COLORADO and	)	
JOHN H. HECKERS, Director of	)	
Revenue,	)	
	)	
Defendants-Appellees.	)	

Upon consideration of the request of the Colorado Court of Appeals for determination of jurisdiction, it is this day ordered that jurisdiction be, and hereby is, accepted.

BY THE COURT, EN BANC, AUGUST 30, 1973.

NO. 26158

COORS PORCELAIN COMPANY,

Plaintiff-Appellant,

v.

STATE OF COLORADO and JOHN H. HECKERS, Director of Revenue,

Defendants-Appellants

Appeal From the District Court

of the

County of Jefferson

Honorable Roscoe Pile, Judge

EN BANC JUDGMENT AFFIRMED

Reardon, Reardon and Reardon,
Julie M. Reardon,

Attorneys for Plaintiff Appellant,

John P. Moore, Attorney General,
John E. Bush, Deputy Attorney General,
Bernard S. Kamine, Assistant Attorney General,

Attorneys for Defendants-Appellees,

MR. JUSTICE GROVES delivered the opinion of the Court.

As it had done in previous years, for the years 1963 through 1966 the plaintiff (Coors) included in its state income tax returns only the income which it regarded as allocable to Colorado. The Director of Revenue (referred to as the director) assessed income tax for all of Coors income for those years. Coors paid the deficiencies assessed and brought action in the district court to recover them. The court concluded that under an agreed statement of facts the deficiencies had been properly assessed, and dismissed the complaint. Coors appealed to the Court of Appeals and we accepted the case upon petition of the Court of Appeals under 1969 Perm. Supp., C.R.S. 1963, 37-21-10(1)(a). We affirm.

The court concluded that Coors "does no business outside Colorado and has no established business tie outside Colorado." The implied effect of the judgment of dismissal is that the applicable statutes and regulations are valid and that the director correctly proceeded thereunder to collect tax on all of Coors' income.

The material portions of the stipulation of facts read as follows:

> "The Coors Porcelain Company sells its manufactured porcelain and ceramic products in the States of Colorado, California, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New York, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia and Wisconsin. It also sells its ceramic and porcelain products in the following foreign countries: Canada, England, France, India and the Netherlands.
>
> "Coors employs sales employees or sales agents for all of the states and foreign countries where their products are sold.
>
> "During the years involved Coors employed approximately ten field sales employees, all of whose titles were Regional Sales Manager. These salesmen are salaried

employees. All of these employees reside in and maintain their business offices outside the State of Colorado and in states where Coors products are sold.

"During the years involved Coors employed approximately ten commissioned sales agents. They reside in and maintain their business offices outside the State of Colorado and in states and foreign countries where Coors products are sold.

* * *

"It primarily operates a job shop manufacturing custom items. About 10% of its manufactured products are standard cataloged items . . . .

"Coors requires that their field representatives be technically qualified in the ceramics and porcelain business and prior to employment they must possess educational background and practical experience in this specialized field. These field representatives are further trained by Coors. The field representatives duties and responsibilities are as follows: To solicit sales from present customers and to develop and acquire new customers; To be fully knowledgeable with respect to all the facets of Coors products in order to be able to demonstrate to present and potential customers the advantages of Coors product over other available products; To design parts for manufacture by Coors which will fit the needs of a particular customer or potential customer; To be able to intelligently discuss with customer engineers the problems they are encountering and to recommend design of Coors products to solve the particular problem involved; To be able to present price-quotations to the customer and negotiate such prices; To follow up after such price-quotation for the purpose of insuring that the potential customers will place their order with Coors; To develop new application for Coors products with present or new customers; To generally develop and maintain a good public relationship with the technical employees and purchasing agents of Coors

customers; To maintain all essential records required for field operations including delivery and order records; To discuss with customers any complaints or problems involving the purchased product; To demonstrate to customers how each Coors product operates and explain to them why they should purchase the Coors product.

"Orders are mailed either from the agent or from a customer to Golden, Colorado, from which point the orders are approved and shipped. Some agents buy directly and resell to their customers; some merely solicit the orders from customers and Coors ships directly to the customer and pays a commission to the agent. Prices are established based on production standards determined in its Estimating Department, or by negotiation between the engineering field salesman and the customer and approved by the office in Golden, Colorado. All sales are completed upon delivery to and acceptance by the customer. Most of its manufactured products are custom made as the result of designs submitted by its field representatives.

"Each field representative maintains his own business office in the locality wherein he resides. Coors supplies each field representative with a business automobile and also places advertisements in the local telephone directory listing the local representative's business telephone. Coors does not consistently maintain warehouses or stocks of products, parts or supplies outside of Colorado, but its out of state representatives do consistently maintain sample materials owned by Coors and on occasion they possess Coors products for shipment to the customer and also retain Coors products which have been rejected by the customer upon delivery."

It is Coors' contention that our statute is being misinterpreted by the director or, if correctly interpreted, the applicable regulation of the Department of Revenue and Rulings thereunder to the effect that Coors is not doing business outside of Colorado constitute an unconstitutional interference with interstate commerce.

We mention initially that we are inclined to agree with the statement of the Attorney General that our General Assembly has sought to tax all the income that Colorado can constitutionally tax. Our statute provides as follows:

> "A tax is hereby imposed upon each domestic corporation, and foreign corporation doing business in Colorado, annually in an amount equal to five percent of the net income of such corporation during the year derived from sources within Colorado. Income from sources within Colorado includes income from tangible or intangible property located or having a situs in this state and income from any activities carried on in this state, regardless of whether carried on in intrastate, interstate, or foreign commerce." 1965 Perm. Supp., C.R.S. 1963, 138-1-35.[1]

The statute further provides for the allocation or apportionment to other states in certain instances of receipts of interest from intangible personal property, dividends, gains and losses, royalties and rents. The statute then states, "If the corporation carries on no business outside of Colorado, the whole or the remainder of the net income shall be allocated to Colorado." A formula is provided for computations of the tax on income derived from sources both within and without Colorado, 1965 Perm. Supp., C.R.S. 1963, 138-1-37.

Regulation 37 of the Department of Revenue contains criteria for determining whether or not a corporation is doing business in Colorado, and whether or not the portions of its income arising from out-of-state sales are taxable under the Income Tax Act. Regulation 37 provides in part: "The criteria for determining when a corporation is doing business in Colorado shall be the same as for determining when a corporation is doing business out of Colorado."

---

[1]The taxes involved are for the years 1963 through 1966. Our income tax statutes were repealed and re-enacted in 1964. We here cite the re-enactments. The predecessor statute was C.R.S. 1963, 138-1-1 through 65. So far as this case is concerned, we have not perceived any substantial change by the re-enactment.

It has been the rule that a foreign corporation which had "established a commercial domicile" in the state might be taxed by that state on income allocable to that state, and that such taxation would not be an unconstitutional burden upon interstate commerce. *Underwood Typewriter Co. v. Chamberlain,* 254 U.S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920). The corollary has been that such taxation upon a corporation which had not established a commercial domicile would unduly burden interstate commerce. As further background, we quote from *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959):

> "It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. *Gibbons v. Ogden,* 9 Wheat. 1 (1824). In keeping therewith a State 'cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers. *Robbins v. Taxing District,* 120 U.S. 489, 493-494 (1887). Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce, *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951). Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, *Memphis Steam Laundry v. Stone,* 342 U.S. 389 (1952); *Nippert v. Richmond,* 327 U.S. 416 (1946), or by subjecting interstate commerce to the burden of 'multiple taxation,' *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954); *Adams Mfg. Co. v. Storen,* 304 U.S. 307 (1938). Such impositions have been stricken because the States, under the Commerce Clause, are not allowed 'one single-tax-worth of direct interference with the free flow of commerce.' *Freeman v. Hewit,* 329 U.S. 249, 256 (1946).

> "On the other hand, it has been established since 1918 that a net income tax on revenues derived from interstate commerce does not offend constitutional limitations upon state interference with such commerce. The decision of *Peck & Co. v. Lowe*, 247 U.S. 165, pointed the way. There the Court held that though true it was that the Constitution provided 'No Tax or Duty shall be laid on Articles exported from any State,' Art. I, §9, still a net income tax on the profits derived from such commerce was not 'laid on articles in course of exportation or on anything which inherently or by usages of commerce is embraced in exportation or any of its processes .... At most, exportation is affected only indirectly and remotely.' *Id.*, at 174-175,"

In *Northwestern States Portland Cement Co., supra,* the foreign corporation operated an office within the taxing state, and one or more salesmen actively solicited orders within the state for the purchase of the corporation's products. Such orders were subject to acceptance, filling and delivery at the corporation's principal office located in another state. It was held that the taxing state could collect an income tax on that portion of the net income reasonably attributable to the corporation's business activities within that state. Later than year Congress enacted P.L. 86-272, 73 Stat. 555, 15 U.S.C. §381. This statute fixed minimum standards of business activity for a foreign corporation under which the state could not tax any portion of the corporation's income. It provided in part that a corporation could not be taxed if its only business activities within the state were either, or both, of the following:

> "(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
>
> "(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if

orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

To show the reason for and effect of the federal statute, we quote from *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 93 S. Ct. 483, 34 L. Ed. 2d 472 (1972):

> "The impetus behind the enactment of §381 was this Court's opinion in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959). There we held that 'net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.' 358 U.S., at 452, 79 S.Ct., at 359. Congress promptly responded to the 'considerable concern and uncertainty' and the 'serious apprehension in the commercial community' generated by this decision by enacting Pub.L.No. 86-272, 73 Stat. 555, 15 U.S.C. §381, within seven months.
>
> "In this statute, Congress attempted to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, *Northwestern States Portland Cement* did not adequately specify what local activities were enough to create a 'sufficient nexus' for the exercise of the State's power to tax. Section 381 was designed to define clearly a lower limit for the exercise of that power." (footnotes omitted.)

I

The director uses this federal statute as a guideline, but, as is to be observed from the above quoted regulation, it is turned around. The statute related to doing business by a foreign corporation within a state, whereas the regulation

provides in effect that, if under this statute a foreign corporation is not doing business in a state, then the income attributable to that state is taxable by the state in which the corporation is domestic.

Coors contends that the federal statute relates only to standards applicable to a foreign corporation, and that the corollary cannot be used as standards for taxable income by the state in which the corporation is domestic. Therefore, says Coors, *Northwestern States Portland Cement Co. v. Minnesota, supra,* is applicable and, under the stipulated facts, Colorado cannot tax income attributable to other states. We disagree and hold that the statute may be used in a correlative manner as the regulation provides. No unconstitutionality has been demonstrated to us.

There have been cited and we have read *Hervey v. AMF Beaird, Inc.*, 250 Ark. 147, 464 S.W. 2d 557,(1971); *Hawes v. William L. Bonnell Co.*, 116 Ga. App. 184, 156 S.E.2d 536 (1967); *Tonka Corporation v. Commissioner of Taxation*, 284 Minn. 185, 169 N.W.2d 589 (1969); *Iron Fireman Manufacturing Company v. State Tax Commission*, 25, Or. 227, 445 P.2d 126 (1968); *Herff Jones Co. v. State Tax Commission*, 247 Or. 404, 430 P.2d 998 (1967); *Cal-Roof Wholesale, Inc. v. State Tax Commissioner*, 242 Or. 435, 410 P.2d 233 (1966); *Commonwealth v. Hellertown Manufacturing Co.*, 438 Pa. 134, 264 A.2d 382 (1970); and *Wisconsin Department of Taxation v. Blatz Brewing Co.*, 12 Wis. 2d 6, 5, 108 N.W.2d 319 (1961). These cases involved either circumstances beyond the solicitation of orders or are distinguishable by reason of difference in statutes, or both. Coors has emphasized *General Motors v. Colorado*, ____ Colo. ____, 509 P.2d 1260 (1973), which at the time the briefs were written was pending on appeal. The issues involved here were not raised in that case.

II

Coors does not seriously contend that under the federal statute it is doing business in a tax sense in states other than Colorado. Rather, it is argued that the statute applies to

foreign corporations and cannot be applied to domestic corporations. We have already disposed of that argument.

Nevertheless, we must rule on whether Coors was "doing business" outside the state. The question may be distilled to an inquiry of whether or not Coors went beyond the solicitation of orders in its out-of-state business. It is implicit in the trial court's ruling that it concluded that Coors' out-of-state business did not extend beyond solicitation of orders. We reach the same conclusion.

From the stipulated facts, the only possible extension by Coors' out-of-state representatives beyond the solicitation of orders is the statement that "on occasion they possessed Coors products for shipment to the customer and also retained Coors products which have been rejected by the customer by delivery." It appears that these acts are not in common practice and are the exception rather than the rule. Otherwise, we can assume that Coors would have seen to it that the stipulation demonstrated that these acts were not exceptional and were in the course of regular practice.

III

An assistant attorney general in oral argument expressed the opinion that the stipulation of facts is not sufficiently complete and definitive, and that we should remand the matter to the trial court for a hearing to further develop the facts.[2] Coors, however, is satisfied with the stipulation and wants the case determined on the agreed facts. Certainly, the Department of Revenue is bound by its stipulation and we have no right to remand for further hearing absent the consent of Coors. If Coors changes its mind in this respect, it can so indicate in its petition for rehearing.

---

[2]Another assistant attorney general participated in the preparation of the stipulation.

IV

Coors has emphasized that for the years prior to 1963 it uniformly was permitted to allocate Colorado and out-of-state income. We held in *Union Pacific R.R. Company v. Heckers*, ____ Colo. ____, 509 P.2d 1255, announced earlier this year, that the director may change methods of allocation. The same rule applies here.

Judgment affirmed.

MR. JUSTICE KELLEY did not participate.

CLERK'S OFFICE
SUPREME COURT
STATE OF COLORADO
DENVER, 80203

January 28, 1974

CASE NO. 26158
Coors Porcelain Company
v.
State of Colorado, et al

The Honorable John P. Moore,
Attorney General,
Mr. John E. Bush,
Deputy Attorney General,
Mr. Bernard S. Kamine,
Asst. Attorney General,
State Capitol,
Denver, Colorado. 80203.

Messrs. Reardon, Reardon and Reardon,
a Professional Corporation,
2150 First National Bank Building,
Denver, Colorado. 80202.

Gentlemen:

The following proceedings were this day had in the above number and titled case:

The petition for rehearing was denied.

Remittitur issued.

Yours very truly,

RICHARD D. Turelli, Clerk.

By /s/ Florence Walsh
Deputy Clerk

APPENDIX B

Title 15 – United States Code Annotated

Section 381. Imposition of net income tax. - - Minimum standards

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State, by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Domestic corporations; persons domiciled in or residents of a State

(b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to –

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

Sales or solicitation of orders for sales by independent contractors

(c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

Definitions

(d) For purposes of this section –

(1) The term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

STATUTES

C.R.S. 1953, 138-1-3

138-1-3. Corporations – (1) Upon corporations, except those corporations described in section 138-, -6, there shall be levied and collected and paid for each taxable year, a tax at the rate provided in subsection (2) of this section upon the net income of every corporation derived from sources within this state. Income from sources within this state includes income from tangible or intangible property located or having a situs in this

state and income from any activities carried on in this state, regardless of whether carried on in intrastate, interstate, or foreign commerce.

C.R.S. 1963, 138-1-35

138-1-35. Corporate tax imposed. – A tax is hereby imposed upon each domestic corporation, and foreign corporation doing business in Colorado, annually in an amount equal to five per cent of the net income of such corporation during the year derived from sources within Colorado. Income from sources within Colorado includes income from tangible or intangible property located or having a situs in this state and income from any activities carried on in this state, regardless of whether carried on in intrastate, interstate or foreign commerce.

C.R.S. 1963, 138-1-37

138-1-37. Allocation of income – domestic and foreign –

(1)(a) In the case of corporations, the entire net income shall be allocated or apportioned as provided in subsections (1) and (2) of this section.

***

(2)(a) The remainder of the net income not specifically allocated in subsection (1) of this section shall be allocated or apportioned as provided in this subsection (2).

(b) If the corporation carries on no business outside of Colorado, the whole of the remainder of the net income shall be allocated to Colorado; and

(c) If the corporation derives income from sources both within and without Colorado, the said remainder of the net income shall be divided into two equal parts; Of one-half such portions shall be attributed to sources

within Colorado as shall be found by multiplying the said one-half by a fraction, the numerator of which is the net book value recognized for federal income tax purposes of all of the real property and tangible personal property of the corporation situated within Colorado, and the denominator of which shall be the net book value recognized for federal income tax purposes of all the real property and tangible personal property of the corporation wherever situated; of the other one-half, such portion shall be attributed to the sources within Colorado as shall be found by multiplying the said one-half by a fraction, the numerator of which is the amount of gross receipts assignable to Colorado as provided in subsection (3) of this section and the denominator of which is the amount of gross receipts from all its business.

(3)(a) The amount of gross receipts assignable to Colorado shall be the amount of gross receipts from sources provided for in this subsection (3).

(b) Sales where the goods, merchandise and property is received in this state by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser; provided, that direct delivery in Colorado from within or without Colorado by the taxpayer to a person or to a firm in Colorado designated by a purchaser shall constitute delivery to the purchaser in Colorado. The word "sales", as used in this subsection (3), shall be construed to include rentals of tangible personal property, which are not separately allocated under subsection (1)(e) of this section, and to include any transaction involving the transfer or substitution of property. The place where the order is taken or approved, or the place where the title to property passes, shall be disregarded for the purposes of determining sales which are assignable to Colorado under this section. The

word "sales" as used in this subsection (3), shall not be construed to include sales made to purchasers in Colorado if the taxpayer does not thereby derive income from sources within Colorado.

(c) Revenue from services rendered in this state.

(d) All other revenue or income not included in subsection (3)(b) or (3)(c) of this section and which is not specifically allocated in subsection (1) provided, that such revenue or income is derived from sources within Colorado.

REGULATIONS

I. Regulations under C.R.S. 138-1-35

Reg. 35. This section of the Act imposes a tax on corporations doing business in Colorado at the rate of 5% on the net income from Colorado sources.

The determination of what constitutes doing business in this State for purposes of this Act may differ substantially from the determinations of what constitutes doing business for the purposes of qualification or service of process. For the purpose of this Act the term "doing business" is used in a comprehensive sense and includes all activities of a corporation whether carried on in interstate, intrastate, or foreign commerce. Irrespective of its activities, every corporation organized for profit and carrying out any of the purposes of its organization in this State is doing business in this State.

Corporations which have neither employees nor stocks of goods in Colorado, and which engage in no activities here, other than the shipping of goods to customers in this State pursuant to orders received by mail, telephone or telegraph, are neither doing business nor deriving income from sources in this State and are, accordingly, not taxable under this Act. Such corporations are likewise not subject to tax, even though

sales are made to customers in this State pursuant to orders taken by independent brokers or dealers if such corporations have neither employees nor stocks of goods in this State and engage in no other activities here.

Corporations which maintain a stock of goods in this State either in a public warehouse or in the hands of any other person from which orders are filled, maintaining any business location in the state including any kind of office, owning property in this state, conducting activities through employees having authority to accept orders or conducting activities through employees engaged in performing services, purchasing activities, performing promotional activities within the state, operating mobile stores through driver salesmen, or any activities or ownership related to any of the foregoing items will be considered as doing business within the state and subject to the provisions of this Act.

II. Regulations under 138-1-37:

Reg. 37. Allocation of income. – Once it has been established that a corporation is doing business in Colorado it must be determined to what extent the net income of the corporation is from sources within Colorado. For corporations which are doing business both within and without Colorado the income from Colorado sources will be deemed to be the income apportioned or allocated to Colorado under the provisions of this section.

A corporation may not be held to be doing business outside of Colorado merely by the fact that it ships merchandise out of Colorado. Instead it must be able to show that it has established a business tie (nexus) in another state. The term "doing business" as used for purposes of service of process, or the fact that a corporation is qualified to do business in another state under the laws of such other state will have no standing under this Act. Before a corporation can claim to be doing business in another state, for purposes of allocating or apportioning income under this section, it must have income arising from the activity of one or more of its employees located in that other state; or arising from the fact

that real or tangible personal property is located in such state for business purposes, and that such property is actually used for such purposes, or both.

The determination as to whether an employee or employees or property is or are located in Colorado or in another state for a period of time sufficient to establish "doing business" in Colorado or in such other state, or the determination as to the period of time a corporation may be held to be doing business in Colorado or in another state is one to be made in accordance with the facts apparent in each individual case.

The criteria for determining when a corporation is doing business in Colorado shall be the same as for determining when a corporation is doing business out of Colorado.

SUPREME COURT, U. S.

73-1747

JUN 18 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1974

NO. A-960

COORS PORCELAIN COMPANY,

Petitioner,

v.

STATE OF COLORADO,
and JOHN H. HECKERS,
Director of Revenue,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

JOHN P. MOORE
Attorney General

JOHN R. BUSH
Deputy Attorney General

EUGENE F. MERCHEY, JR.
Assistant Attorney General

104 State Capitol Building
Denver, Colorado 80203
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EASTWOOD PRINTING CO. • 2564 LARIMER STREET • DENVER, COLORADO

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RULES

U.S. Supreme Court Rule 19, 28 U.S.C.A. 5

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1974

NO. A-960

COORS PORCELAIN COMPANY,

Petitioner,

v.

STATE OF COLORADO,
and JOHN H. HECKERS,
Director of Revenue,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

QUESTIONS PRESENTED

Contrary to the position of the petitioner, it is respectfully submitted that the questions presented are:

1. Whether the Colorado Supreme Court erred in employing Federal Public Law 86-272, 15 U.S.C. 381 as the standard to determine if a domestic Colorado corporation (Coors) is "doing business" outside the State of

Colorado for purposes of imposing Colorado corporate income tax on Coors.

2. Does the formula for allocation of domestic and foreign income contained in C.R.S. 1963, 138-1-37, as amended, (Supp. 1965), which provides that:

> "If the corporation carries on no business outside of Colorado, the whole of the remainder of the net income shall be allocated to Colorado,"

violate the interstate commerce and due process clauses of the United States Constitution?

STATEMENT OF THE CASE

The petitioner's statement of the case is substantially accurate, except that the Colorado Supreme Court and the trial court concluded that Coors' out of state business did not extend beyond solicitation of orders. It is respectfully submitted that the Colorado Supreme Court did no more than decide whether or not Coors was doing business outside the State of Colorado and that the Colorado taxing statute at issue is not unconstitutional.

REASONS FOR NOT GRANTING THE WRIT

A. The decision of the Colorado Supreme Court does not present a Federal question of substance not yet determined by the United States Supreme Court or determined contrary to a prior United States Supreme Court decision. The Colorado Supreme Court decided that Coors is not "doing business" outside Colorado under the standard found in Public Law 86-272, therefore, under C.R.S. 1963, 138-1-37, as amended, (Supp. 1965), the entire net income of Coors is to be allocated to Colorado for income tax purposes. Coors argues that the Colorado Supreme Court

decision is contrary to the holding in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S. Ct. 357 (1959). It is respectfully submitted that the Colorado decision is clearly consistent with that case. It is the respondents' position that Public Law 86-272 did not negate the effect of the *Northwestern* decision, but only defined more clearly the limits of said case. The relationship between the *Northwestern* case and Public Law 86-272, 15 U.S.C. § 381, was interpreted in *Heublein, Inc., v. South Carolina Tax Commission,* 409 U.S. 275, 93 S. Ct. 483, 34 L.Ed 472 (1972), where this court stated:

> "The impetus behind the enactment of § 381 was this Court's opinion in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S. Ct. 357, 3 L.Ed.2d 421 (1959). There we held that 'net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same.' 358 U.S., at 452, 79 S. Ct., at 359. Congress promptly responded to the 'considerable concern and uncertainty' and the 'serious apprehension in the commercial community' generated by this decision by enacting Pub. L. No. 86-272, 15 U.S.C. § 381, within seven months.
>
> "In this statute, Congress attempted to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, Northwestern States Portland Cement did not adequately specify what local activities were enough to create a 'sufficient nexus' for the exercise of the State's power to

tax. Section 381 was designed to define clearly a lower limit for the exercise of that power."

The legislative history of § 381 shows that Congress had rather limited purposes which are not evaded by Colorado statutes and regulations governing corporate income tax imposed on domestic corporations. Congress did not focus on the consequences of its action for such local taxable schemes. Therefore § 381 cannot be read as prohibiting the states from enacting such schemes. Such a reading would require the assumption that Congress carefully considered the difficult problems of accommodating the Federal interest in open national economy with local interest in taxing domestic corporations. The evidence is clear that Congress did not do so.

Section 381 was designed to define clearly the lower limit of the states' power in taxing business activities. The states' interest in taxing below a certain limit (solicitation) was weaker than the national interest in promoting an open economy. The Colorado Supreme Court merely applied the standard set forth in Public Law 86-272 as to the issue of "doing business", but did not use said law to exempt from taxation. Coors argues such standard does not apply to domestic corporations. Under the Coors proposed double standard, the foreign states could not tax Coors' income generated by the activity in those states because that activity was less than the minimum established by the Federal legislation; and additionally, Colorado, by having a different standard for domestic corporations than the Federal statute forces it to have for foreign corporations, would also be unable to tax that income . Thus, Coors would completely avoid paying state income taxes on its activities outside Colorado. This was clearly not the intent of Public Law 86-272 and this is what C.R.S. 1963, 138-1-35, 37, as amended (Supp. 1965) seeks to prevent.

Therefore, the petitioner fails to show that the Colorado Supreme Court decision is contrary to the *Northwestern* case or any other prior U.S. Supreme Court case and in the absence of the above, there can be no review on certiorari. U.S. Supreme Court Rule 19, 28 U.S.C.A.

B. The petitioner also argues that the threat of multiple and unapportioned taxation of income from interstate commerce violates the interstate commerce and due process clauses of the United States Constitution. The Colorado Supreme Court determined that Coors does no more than solicit business outside of Colorado and therefore is not doing business outside of Colorado for tax purposes in accordance with Public Law 86-272. This factual decision, that Coors only solicits business in other states, is not a federal question and the application of the Federal statute by other states prohibits multiple taxation and, therefore prevents any undue burden on interstate commerce.

The petitioner cites *Evco v. Jones,* 93 S. Ct. 349 (1972) for the proposition that a tax levied on the gross receipts from the sales of intangible personal property in another state is an impermissible burden on interstate commerce. However, petitioner fails to point out that the New Mexico statute in *Evco* is totally different from the Colorado statute in that the type of tax involved in New Mexico was a gross receipts tax imposed on the receipts from services performed in the state. The New Mexico law specifically prohibited taxation of income from the sale of property outside the state. The Colorado Supreme Court considered the threat of double taxation and found it to be insubstantial in view of the Federal statute, 15 U.S.C. 381. The petitioner fails to show any impermissible burden on interstate commerce in view of Public Law 86-272 and the facts in this case. In the absence of a

substantial federal question there can be no review on certiorari.

CONCLUSION

WHEREFORE, the respondents respectfully pray that this Honorable Court deny the petition for writ of certiorari.

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